INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 734

DAVID RAE PETERSON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 735

PETER NIZNIK, PETITIONER

v.

UNITED STATES OF AMERICA

No. 736

RAYMOND COMODOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals in No. 734 (Supp. R. 6-13)[1] is reported at 173 F. 2d 111. The opinion of the Court of Appeals in Nos. 735 and 736 (Supp. R. 14-26) is reported at 173 F. 2d 328.

[1] The joint record for all three cases is in two volumes, one containing the proceedings in the District Court, and the other, not consecutively paginated, the proceedings in the Court of Appeals. The former is referred to herein by "R", the latter, by "Supp. R."

JURISDICTION

The judgments of the Court of Appeals were entered March 7, 1949 (Supp. R. 6, 13). On March 26, 1949, Mr. Justice Reed extended the time for filing petitions for writs of certiorari to April 25, 1949 (Supp. R. 27), and the petitions were filed on April 18, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether a selective service registrant, classified as a conscientious objector, who reports to a civilian public service camp for work of national importance and departs from the camp without leave after remaining there nearly 18 months, can, in a prosecution for deserting the camp, assail the validity of the order to report on the ground that it was issued more than 90 days after his pre-induction physical examination.

2. Whether petitioners Niznik's and Comodor's local board unlawfully withheld from the appeal board pertinent information respecting their claims to exemption from service as ministers of religion by failing to reduce to writing and include in their files oral evidence, not already substantially contained in their files, presented by them to the local board on the occasions of personal appearances before it.

3. Whether, in the circumstances of this case, the Court of Appeals should have directed the entry of

judgments of acquittal as to petitioners Niznik and Comodor, rather than merely remanding the causes for a new trial.

STATEMENT

On December 2, 1946, separate indictments (R. 1, 12, 23) were filed in the District Court for the Eastern District of Tennessee, charging petitioners with having wilfully deserted from a Civilian Public Service Camp, in violation of Section 11 of the Selective Training and Service Act (50 U.S.C. App. 311). The cases were consolidated for trial (R. 35), and following a trial by jury each petitioner was found guilty (R. 114) and sentenced to two years' imprisonment (R. 4, 15, 26). On appeal to the Court of Appeals for the Sixth Circuit, petitioner Peterson's conviction was affirmed (Supp. R. 6), and petitioners Niznik's and Comodor's convictions were reversed and the causes remanded for a new trial (Supp. R. 13).[2]

It was stipulated prior to trial that each petitioner, having been classified 4-E (conscientious objector) and having reported to Civilian Public Service Camp No. 108, Gatlinburg, Tennessee, pursuant to an order to report to that camp for work of national importance, thereafter departed from the camp without authority and failed to return (R. 36-37). The sole contested issue at the

[2] Petitioners Niznik and Comodor contend in this Court that the Court of Appeals should have directed the entry of judgments of acquittal as to them (Pet. 16).

trial was the validity of the classification and order in each case (R. 37-38).

The Government rested its case on the basis of the above stipulation and petitioners' selective service files (R. 121-155, 156-195, 196-260), which were received in evidence (R. 40). Each petitioner's defense was limited to his own testimony (R. 41-62, 63-79, 79-97), by which he sought to establish the invalidity of his classification, each claiming that he should have been classified 4-D (regular or duly ordained minister of religion) and, as such, exempt from all service under the Selective Training and Service Act.

Petitioners are all Jehovah's Witnesses. Briefly summarized, their selective service files reveal the following facts:

Peterson.—Peterson filed his selective service questionnaire (R. 121-127) on August 10, 1943. He gave his age as 18 (R. 122) and "general farmer" as his occupation (R. 123). He also claimed to have been a minister since 1939 and to "have been active [in] this work" since the age of six (R. 125). He further stated that he was "conscientiously opposed to participation in war in any form" (R. 126). However, he claimed neither a minister's nor a conscientious objector's classification (4-D and 4-E, respectively), but rather an agricultural deferment (class 2-C) (R. 126). On August 20, 1943, he was classified 2-C pursuant to his request (R. 127).

On April 18, 1944, Peterson was reclassified 1-A (R. 127), and he appealed, contending that his 2-C classification should be reinstated (R. 130-132). His letter to the appeal board was devoted mainly to a description of his farming activities (R. 130-131), but incidentally mentioned his conscientious objection to military service (R. 132). The letter made no reference to his claim to be a minister. On June 10, 1944, the appeal board reinstated his 2-C classification for six months (R. 127).

On August 9, 1944, Peterson filled out and submitted a "Special Form for Conscientious Objector" (R. 134-138), and on August 11, 1944, he was reclassified 4-E by his local board (R. 128), which had in the meantime been advised by the War Food Administration that Peterson was not considered essential to agriculture (R. 139). On October 28, 1944, the appeal board also classified Peterson 4-E (R. 128, 140).

On December 12, 1944, Peterson was ordered to report for work of national importance (R. 144), and on January 6, 1945, he reported at Civilian Public Service Camp No. 108, Gatlinburg, Tennessee (R. 146). On April 15, 1946, he addressed a letter to General Hershey, Director of Selective Service (R. 150-151), requesting "release from CPS on the grounds of severe dependency hardship" (R. 151). On May 23, 1946, he addressed a telegram to Colonel Kosch, Camp Operations Division, Selective Service System, requesting a two-week emergency furlough in order that he might

return to his farm and prevent it from being "wasted in weeds" (R. 152). On June 3, 1946, he wrote to President Truman (R. 153-155), complaining that the work he was doing at the camp was of lesser national importance than the operation of his farm, and stating that "No alternative has been left for me but to walk out of the camp on a temporary A.W.O.L. to get my fields plowed * * *" (R. 155). In none of these letters did he claim or suggest that he should have been granted a minister's exemption.

Shortly thereafter, Peterson left the camp without authority and did not return (R. 1, 36-37).

Niznik.—Niznik filed his questionnaire (R. 156-161) on September 17, 1942. He gave his age as 18 (R. 157), and "laborer" as his occupation and the occupation for which he was best fitted (R. 158-159). He also claimed to be a student preparing for the ministry and to be conscientiously opposed to war in any form (R. 160). On September 24, 1942, he filled out and submitted a "Special Form for Conscientious Objector" (R. 170-174). On January 4, 1943, he asked his local board to classify him 4-D, claiming to be "an ordained minister of Jehovah God" (R. 163). On February 4, 1943, he was classified 1-A (R. 161), from which classification he appealed (*ibid.*). On July 20, 1943, in consequence of a recommendation by the Department of Justice (R. 184), following a hearing before a hearing officer (R. 175-183), the appeal

board classified him 4-E, or conscientious objector (R. 162).

On October 8, 1943, Niznik was reclassified 4-F (physically unfit) (R. 162), which classification he retained until February 25, 1946, when he was reclassified 1-A (R. 162). He again appealed, claiming exemption as a minister (R. 187), and the appeal board, on March 22, 1946, reclassified him 4-E (R. 162, 187).

On August 29, 1946, Niznik was ordered to report for work of national importance (R. 191-192). He reported at Gatlinburg Civilian Public Service Camp on September 12, 1946, and immediately thereafter departed without leave (R. 193).

Comodor.—Comodor filed his questionnaire (R. 198-203) on September 8, 1942. He gave his age as 19 (R. 199), and "gasoline station attendant" as his occupation and the occupation for which he was best fitted (R. 199-200). He also claimed to be a minister of religion and to be conscientiously opposed to war in any form (R. 202). He stated that he thought he should be classified 4-D (R. 203). On the same date he submitted a "Special Form for Conscientious Objector" (R. 209-213). On January 2, 1943, he was classified 1-A (R. 203), from which classification he appealed (R. 204), claiming exemption as a minister (R. 217-221). On July 13, 1943, in consequence of a recommendation by the Department of Justice (R. 233), following a hearing before a hearing officer (R. 224-232), the appeal

board classified him 4-E, or conscientious objector (R. 204).

At some time thereafter Comodor was reclassified 4-F (physically unfit) (see R. 89), which classification he retained until approximately April 18, 1945, when he was reclassified 1-A (R. 236). His classification was thereafter again changed by the local board to 4-F, which classification he retained until February 25, 1946, when he was put back in 1-A (R. 253). He again appealed (R. 204), claiming exemption as a minister (R. 251), and the appeal board, on April 5, 1946, again classified him 4-E (R. 253).

On August 29, 1946, Comodor was ordered to report for work of national importance (R. 257-258). He reported at Gatlinburg Civilian Public Service Camp on September 12, 1946, and immediately thereafter departed without leave (R. 258).

Other facts relevant to the validity of petitioners' final 4-E classifications will be referred to in the Argument, *infra*.

ARGUMENT

1. Petitioner Peterson, following his 1-A classification on April 18, 1944 (R. 127), was given a pre-induction physical examination on May 8, 1944, and found to be physically fit for military service (R. 132). He was thereafter reclassified 2-C on June 10, 1944 (R. 127), and 4-E on August 11, 1944 (R. 128). On December 12, 1944, he was ordered to report for work of national importance,

in accordance with his 4-E classification (R. 144). His selective service file does not indicate that he was given another pre-induction physical examination after that of April 18, 1944. Peterson contends that the fact (which we shall assume) that he was not given another physical examination within 90 days prior to the issuance of the order to report rendered the order a nullity which he was at liberty to ignore (Pet. 7-11).

The contention is clearly without merit. See *Miller* v. *United States,* 169 F. 2d 865, 866-867 (C. A. 6), where the identical contention was discussed at length and found unmeritorious. See also *United States* v. *Balogh,* 160 F. 2d 999 (C.A. 2), certiorari denied, 331 U.S. 837, where the court said, "* * * it would be absurd to say that a registrant who has been ordered to report may safely treat that order as waste paper, because he has been deprived of a second preliminary examination" (160 F. 2d at 1001). Furthermore, Peterson spent nearly 18 months in the Civilian Public Service Camp without ever having questioned the legality of the order to report on the ground on which he now challenges it. Even assuming for argument, therefore, that such an attack on the validity of the order might be meritorious if timely made, it clearly was made much too late.[3]

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[3] It is to be noted that the issue here has nothing to do with the question of the point at which a registrant exhausts his administrative remedies so as to be in a position to question the validity of his classification and order to report in a judi-

2. Petitioners Niznik and Comodor were each granted two personal appearances before their local board,[4] at which they argued, unsuccessfully, that they were entitled to 4-D classifications as ministers of religion. Niznik's first appearance was on January 12, 1943, before he was initially classified (R. 64); his second appearance was on March 11, 1946 (R. 162), following his reclassification to class 1-A on February 25, 1946 (*ibid.*). Comodor's first appearance was also on January 12, 1943, shortly following his initial classification of 1-A (R. 81, 203); his second appearance was on March 18, 1946 (R. 90), following his reclassification to class 1-A on February 25, 1946 (R. 253). Each testified at the trial that, on each appearance, he orally gave the board "new information" bearing on his ministerial activities and claim to a minister's exemption, which was not already contained in his selective service file (R. 64-68, 70-72, 81-88, 90-92). They contend that the local board failed to reduce to writing such additional information and incorporate it in their files for consideration by the appeal board, and that the local board, by such failure, violated § 625.2(b)[5] of the Selec-

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cial proceeding (cf. *Estep* v. *United States*, 327 U.S. 114, with *Falbo* v. *United States*, 320 U.S. 549); the issue rather concerns the validity of the order itself.

[4] Niznik and Comodor were both registered with the same local board (R. 156, 198).

[5] Selective Service Regulation 625.2(b) (32 C.F.R., 1943 Cum. Supp., § 625.2(b)) provided: "At any such appearance [before a local board], the registrant may discuss his classi-

tive Service Regulations and thus prevented the appeal board from being in a position to pass upon their claims to ministerial status on the basis of all the information that was before the local board (Pet. 17-22).

The court below, however, after extensively reviewing what Niznik and Comodor claimed at the trial to have orally presented to the local board on the occasions of their appearances before it (Supp. R. 18-19), concluded that "Everything, substantially, that appellants claimed to have introduced as oral evidence appears to have been already in the written evidence in their files, either in letters from appellants themselves or other documentary proof filed by them—certainly, at the time of their second appearance before the local board. Nevertheless, the local board did summarize, briefly, it is true, what it purported to consider the oral information given by appellants on their appearance

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fication, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing or, if oral, shall be summarized in writing and, in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. The member or members of the local board before whom the registrant appears may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary."

before the board" (Supp. R. 19).[6] And later in its opinion the court below further stated that "From our inspection of the record, there was substantially no information presented orally in addition to what was already contained in the written evidence in the files which was not summarized" (Supp. R. 21).

Without attempting to cover the matters reviewed by the Court of Appeals, and to match, item by item, everything that petitioners Niznik and Comodor, according to their testimony at the trial, told their local board on the occasions of their personal appearances before it, with material already in their files at the time, we submit that the above conclusion of the Court of Appeals was entirely justified.[7]

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[6] The local board's summaries are quoted in the Court of Appeals' opinion at Supp. R. 19-20.

[7] Petitioner Peterson also makes the contention (cf. Pet. 11 with Pet. 4) that his local board failed to summarize and incorporate in his selective service file oral evidence, given on the occasion of his appearance before the board on or about August 20, 1943 (R. 45-46, 129), relating to his ministerial activities. However, unlike petitioners Niznik and Comodor, who consistently claimed exemption from all service as ministers of religion, Peterson never at any time sought exemption as a minister. His claim, from beginning to end, was that he was entitled to an agricultural, or 2-C, exemption (see pp. 4-6, *supra*). As the court below remarked (Supp. R. 12-13), "In this case, [Peterson] pointed out to the board the class in which he thought he should have been placed, and all the information he gave the board was to assist it in determining his classification as II-C. His last act before either of the boards was to appeal from the final classification of IV-E, and

3. Petitioners Niznik's and Comodor's main contention is that the Court of Appeals should have directed the entry of judgments of acquittal as to them, rather than merely remanding the causes for a new trial (Pet. 16, 17-19, 23). The pertinent facts on this issue are as follows:

Both Niznik and Comodor gave testimony at the trial which, as stated by the Court of Appeals (Supp. R. 25), if true, "clearly proved prejudice and unlawful discrimination on the part of the local board against appellants and deprived them of a hearing in accordance with the requirements of due process." The testimony in question, indicating prejudice against these petitioners based on their religious beliefs, is summarized in the opinion below at Supp. R. 24-25 and need not be repeated. As we have previously indicated (*supra,* p. 4), the Government introduced no evidence to contradict their testimony in this regard, but rested its case on the basis of the selective service files and the admitted fact that both petitioners permanently departed from the Civilian Public Service Camp

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to ask that he be again classified II-C. Under these circumstances, the contention now made that he had sought exemption from service on the ground that he was a minister of religion seems unjustified, and such a claim appears to be only an afterthought. In any event, as we have held, there is no evidence that he ever claimed such exemption before the board as a minister of religion, and the argument that the board deprived him of a fair hearing by failing to send up a record to the appeal board setting forth that he made a claim of such exemption, and thereby prevented him from being classified as a minister, is unsupported by the evidence."

without authority. Both the prosecuting attorney and the trial judge seem to have been of the view (see R. 101, 106, 110) that under *Cox* v. *United States,* 332 U.S. 442, the validity of petitioners' 4-E classifications and orders to report to camp could not be successfully assailed by testimony tending to show prejudice on the part of the local board, so long as the classifications given were not without basis in fact. Consistently with his interpretation of the *Cox* decision, the trial judge, in his charge to the jury, expressly removed from their consideration any issue as to the invalidity of the classifications and orders in consequence of prejudice on the part of the local board (R. 109-110). As a result, in view of the admitted fact that petitioners left the camp without authority, the instruction to the jury was, in practical effect, a direction to convict.[8]

The Court of Appeals, after pointing out that the trial court had misconstrued the *Cox* decision and that "when a board's action is the result of prejudice, and its classification based on discrimination, its conduct is lawless and beyond its

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[8] "* * * I instruct you that the facts stipulated in this case require you to find each of the defendants guilty of having violated an order of the Selective Service Board as charged in each of the indictments. * * *" (R. 110).

Counsel for petitioners, after first excepting to this portion of the charge on the ground that "it is the privilege of a jury to find a defendant not guilty, even when the undisputed evidence may show that he is guilty" (R. 113), subsequently withdrew his objection to the charge on this score (R. 113-114).

jurisdiction" (Supp. R. 25), concluded that "The material questions of fact [*i.e.*, whether the local board was prejudiced against Niznik and Comodor, as they had testified], as heretofore indicated, should be submitted to the jury under appropriate instructions as to the law, so that it may be determined whether the registrants have been afforded due process of law. If, on the event of a retrial, appellants' testimony is disputed, the case should be submitted to a jury. If appellants' testimony and evidence on retrial should be substantially the same as on the former trial, and should be uncontradicted, appellants would be entitled to an acquittal" (Supp. R. 26).

We submit that this disposition of the case as to Niznik and Comodor was proper. Both the trial judge and the prosecuting attorney, misconstruing the *Cox* decision, thought that petitioners' testimony attacking the impartiality of the local board was unavailing on the issue of the validity of their classifications. Now that the court below has clarified the law in this respect, it is possible that the Government will be able to present evidence, in contradiction of petitioners' testimony, which was not adduced at the trial below because deemed unnecessary. If it can do so, the jury at a new trial will be able to resolve the credibility issue under appropriate instructions. If it cannot do so, these petitioners will be entitled to the judgment of acquittal which they seek.

CONCLUSION

The petitions for writs of certiorari do not, in our opinion, present any question requiring further review by this Court. We therefore respectfully submit that they should be denied.

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